In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether a defendant has an absolute right to withdraw his guilty plea after the district court has accepted it but before the district court has decided whether to accept or reject an accompanying plea agreement.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-5a) is reported at 82 F.3d 319 and as amended (see App., *infra*, 6a-7a) at 92 F.3d 779. The order of the district court denying defendant's motion to withdraw his guilty plea (App., *infra*, 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on

July 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE AND GUIDELINES PROVISIONS INVOLVED

Rules 11 and 32(e) of the Federal Rules of Criminal Procedure and Sentencing Guidelines § 6B1.1(a) are reproduced at App., *infra*, 19a-26a.

STATEMENT

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. Appellant's C.A. E.R. 1-11. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. App., *infra*, 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. Appellant's C.A. E.R. 21-29. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. *Id.* at 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *id.* at 22, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, *id.* at 23. Finally, the

agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution that should be ordered. *Id.* at 24-26. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." *Id.* at 26.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. The court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. Appellant's C.A. E.R. 39-46. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines. *Id.* at 46-49.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." Appellant's C.A. E.R. 49. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that defendant agreed with the government's statements about the offenses.

Id. at 50-62. The court asked respondent whether he had committed the crimes charged, and respondent replied "Yes, your honor, I did." *Id.* at 62. The court then reviewed the maximum sentences that could be imposed, *id.* at 63-65, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, *id.* at 65-66. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, your honor." *Id.* at 66. The court accepted the guilty pleas and stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Id.* at 67. The court also filed a written order providing "that the defendant's plea of 'GUILTY' be accepted." *Id.* at 20.

3. On December 23, 1993, respondent filed a motion to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Justice Department officials had threatened harm to his wife. App., *infra*, 10a. There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see *ibid.*; respondent's submission of a "vague and conclusory" unsigned, unsworn statement by respondent's wife, *id.* at 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see *id.* at 12a.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. The court noted that, under Fed. R. Crim. P. 32(e), a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any

fair and just reason." See App., *infra*, 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is * * * no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "the defendant lacks any semblance of credibility," *id.* at 16a, the court ruled "that the defendant entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. App., *infra*, 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of $477,990. Appellant's C.A. E.R. 127-132.

4. The court of appeals reversed. The court held that the requirement of Fed. R. Crim. P. 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case. The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." App., *infra*, 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

> [t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement

> carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

Id. at 3a (quoting *United States* v. *Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, No. 95-9101 (Oct. 7, 1996)). The court concluded that

> [i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

App., *infra*, 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (App., *infra*, 5a), in which he stated that in his view the result in this case followed from the Ninth Circuit's decision in *United States* v. *Cordova-Perez*, *supra*. In that case, the district court accepted a defendant's guilty plea, but after reviewing the presentence report, the court concluded that it could not accept the plea agreement, which provided for dismissal of charges that could have resulted in a high mandatory minimum sentence. *Cordova-Perez*, 65 F.3d at 1554. The Ninth Circuit affirmed the district court's determination in that situation to vacate the defendant's guilty plea and set the matter for trial. *Id.* at 1555-1557. Judge Ferguson had dissented from that decision, and he stated here that he continued to believe that *Cordova-Perez* was wrongly decided. He stated, however, that "when [the government] advocated the result in *Cordova-Perez*, it must live with the mistake," which in his view entailed permitting

the defendant to withdraw his guilty plea for no reason at all in this case. App., *infra*, 5a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason at all—or for no reason—at any time before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea entered into with full procedural safeguards and due formality in open court has no legal significance for a period of months, until the presentence report has been prepared and the court has determined whether to accept the plea agreement. Throughout that period, under the Ninth Circuit's rule, the defendant remains entirely free to withdraw his plea; his confession and plea of guilty amount merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges of which he is accused.

The Ninth Circuit's decision is contrary to express provisions of the Federal Rules of Criminal Procedure. It also conflicts with the decisions of the two other courts of appeals that have addressed the issue. Finally, the decision threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. This Court's review is therefore warranted.

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

The detailed requirements of Rule 11 are based on the recognition "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). As the Court in *Brady* explained, "[c]entral to the plea * * * is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entering a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the defendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

The court of appeals' holding that a guilty plea may be withdrawn at any time before accepting the plea agreement conflicts with the Federal Rules of Criminal Procedure. The Rules do not state or imply that a court that defers decision on whether to accept a plea agreement thereby grants the defendant a license to withdraw his guilty plea at will. To the contrary, the Rules contain two provisions addressing the circumstances under which a plea of guilty may be withdrawn. The court of appeals' decision is inconsistent with both of those provisions.

Rule 11(e)(4) specifically provides that the defendant has an absolute option to withdraw his guilty plea under one circumstance—where the court rejects the plea agreement. See Rule 11(e)(4) ("If the court rejects the plea agreement, the court shall * * * afford the defendant the opportunity to withdraw the plea."). The rationale for that rule is that if the court rejects the plea agreement, the defendant will not receive the benefit of the bargain that induced him to plead guilty; the defendant should therefore have the option to abrogate the agreement and return the situation to the status quo ante. The court of appeals' decision renders that rule superfluous in most cases, by providing the defendant with an unqualified right to withdraw the plea *regardless* of whether the district court accepts or rejects the plea agreement.

The court of appeals' holding is also inconsistent with the requirements of Fed. R. Crim. P. 32(e), which governs when a plea may be withdrawn. Under Rule 32(e), "[i]f a motion to withdraw a plea of guilty * * * is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Although that standard on its face applies to this case, the court of appeals refused to apply it. By permitting a defendant to withdraw a guilty plea regardless of whether he has any reason for doing so, the court of appeals' decision is directly contrary to the terms of Rule 32(e).[1]

[1] The court of appeals' reliance on *Cordova-Perez* was misplaced. App., *infra*, 3a. In *Cordova-Perez*, the court rejected a plea agreement that called for the government to dismiss a greater charge and for the defendant to plead guilty to a lesser-included charge. It then vacated the defendant's guilty plea to the lesser included charge and ordered that the case go to trial. Under Rule 11(e)(4), after rejecting the plea agreement, the court should have inquired whether the defendant still wanted to plead guilty to the lesser included charge before vacating his plea. The defendant, however, did not complain of that error (which in any event would have been easily curable had the defendant simply informed the court that he still wanted to plead guilty to the lesser charge). Instead, the defendant argued that the court erred in permitting trial on the greater charge. The court of appeals correctly rejected that claim. Rule 11(e)(4) plainly envisions that the court's determination not to accept a plea agreement calling for dismissal of certain charges ordinarily will lead to a trial on those charges. The fact that a defendant may have an absolute right to withdraw a guilty plea when the court defers decision on a plea agreement and then *rejects* it (as in a situation like *Cordova-Perez*) does not suggest that a defendant has the same right when the court defers decision on a plea agreement and then *accepts* it (as occurred here).

2. The decision of the court of appeals conflicts with decisions of the Fourth and Seventh Circuits, the only other courts of appeals that have directly addressed the issue.

In *United States* v. *Ewing*, 957 F.2d 115 (4th Cir.), cert. denied, 505 U.S. 1210 (1992), the defendant pleaded guilty in open court after the exhaustive colloquy required by Rule 11, and the court accepted the plea. 957 F.2d at 117. Like respondent, the defendant then moved to withdraw his plea on the ground of coercion. Like the district court in this case, the district court in *Ewing* concluded that the defendant had not established a "fair and just reason" for withdrawing the plea under Rule 32(e), and the court therefore proceeded to sentencing. 957 F.2d at 117.

On appeal, the defendant argued that until the district court has accepted the plea agreement, the defendant "should be able to withdraw his plea upon some showing of cause less demanding than the current fair and just reason standard." 957 F.2d at 118. The court rejected that argument because of "its failure to acknowledge the distinction between a plea of guilty and a plea agreement." *Ibid.* The court noted that the district court had "explicitly accepted [the defendant's] *plea of guilty* immediately following the Rule 11 colloquy," but that it had "defer[red] acceptance of the *plea agreement* until it had an opportunity to review the presentence report." *Ibid.* The court explained that "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32(d), or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." 957 F.2d at 119.

In *United States* v. *Ellison*, 798 F.2d 1102 (1986), cert. denied, 479 U.S. 1038 (1987), the Seventh Circuit reached the identical conclusion on virtually identical facts. The defendant pleaded guilty to four offenses. The district court accepted the guilty plea but deferred its decision whether to accept a plea agreement that required the government to move to dismiss other charges and not to recommend consecutive sentences. 798 F.2d at 1103. Three days before sentencing, the defendant attempted to withdraw his guilty plea on the ground that it was the product of "psychological pressures" and the advice of counsel. *Id.* at 1104. The court denied the motion, finding that there was no defect in the plea proceedings and that the guilty plea had been knowing and voluntary.

On appeal, the defendant advanced essentially the same claim advanced by the defendant in *Ewing* and respondent here: That, despite Rule 32(e)'s "fair and just reason" standard, Rule 11 "requires application of a different standard for withdrawal of guilty pleas entered pursuant to plea agreements that have not yet been accepted by the court." 798 F.2d at 1105. The court rejected that argument, explaining that "to preserve the integrity of the plea-taking process, Congress limited withdrawal of a plea to those situations where defendant demonstrates a fair and just reason." *Id.* at 1106. Therefore, the court held, "there is no absolute right to withdraw a plea prior to acceptance of the plea agreement by the court." *Ibid.*

3. The rule adopted by the court of appeals has damaging implications for the federal criminal system. The vast majority of pleas of guilty in federal

court are accompanied by plea agreements.[2] In such cases, both the Federal Rules of Criminal Procedure and the Sentencing Guidelines provide for deferral of the district court's decision whether to accept a plea agreement. Under Rule 11(e), a court has discretion to defer acceptance of the plea agreement until a presentence report has been prepared and the court has had the opportunity to review it.[3] Under the

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[2] See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions * * * leads to prompt and largely final disposition of most criminal cases.").

[3] If the government has agreed either to drop certain charges (under Rule 11(e)(1)(A)) or that a specific sentence is appropriate (under Rule 11(e)(1)(C)), the Rules expressly provide that "the court may accept or reject the agreement, or may defer its decision * * * until there has been an opportunity to consider the presentence report." Fed. R. Crim. P. 11(e)(2). Insofar as the plea agreement in this case provided that the government would drop certain charges against respondent, it falls within that rule. The court and the parties treated the plea agreement as having been made under Rule 11(e)(1)(A). See Appellant's C.A. E.R. 49.

The Rules also provide that the government may agree in a plea agreement to make a recommendation regarding the sentence that is not binding on the court (under Rule 11(e)(1)(B)). The Rules contemplate that, where a district court rejects such a recommendation, the defendant has no right to withdraw his guilty plea. See Fed. R. Crim. P. 11(e)(2) (the court "shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea"). Insofar as the plea agreement in

Sentencing Guidelines, deferral of a decision whether to accept the plea agreement until the court can review the presentence report is mandatory in most cases.[4] By so deferring a decision on accepting the plea agreement, the court may ensure that the results of the plea bargaining process are consistent with the public interest in the just disposition of criminal charges. In addition, the court may fulfill its obligation "to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." United States Sentencing Comm'n, *Guidelines Manual*, Ch. 6, Pt. B (introductory comments) (Nov. 1, 1995) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 63, 167 (1983)).

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this case provided that the parties agreed to a certain treatment of petitioner's sentence under the Sentencing Guidelines, it could be construed to fall within that rule. The parties and the court at the plea agreement proceeding, however, treated the agreement as having been made pursuant to Rule 11(e)(1)(A) because the government did not make any specific recommendation as to the appropriate sentence. Appellant's C.A. E.R. 49; see also App., *infra*, 17a. Because the district court did not reject any portion of the plea agreement in this case, the question whether the plea agreement was in fact based in part on Rule 11(e)(1)(B) is of no consequence.

[4] Sentencing Guidelines § 6B1.1(c) provides that "[t]he court shall defer its decision * * * to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1." Sentencing Guidelines § 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record."

The result of the Rule 11 and Sentencing Guidelines provisions is that, after accepting a plea of guilty, a district court will ordinarily defer a decision whether to accept a plea agreement for a period of months or longer, until at or near the time of sentencing. Indeed, preparation of a presentence report ordinarily will commence only after the guilty plea is accepted, and when the presentence report is completed, the case is ready for sentencing. Under the Ninth Circuit's rule, during the entire period between the court's acceptance of the guilty plea and sentencing, the defendant has the absolute right to withdraw his guilty plea.

The court of appeals made quite clear that, under its ruling, the defendant need not satisfy any standard of cause to withdraw his guilty plea during that period. Nor need the defendant show that the plea was involuntary, misinformed, or defective in any way. Under the court of appeals' ruling in this case, the defendant need only state he changed his mind: "If the court defers acceptance of the plea *or* of the plea agreement, the defendant may withdraw his plea for any reason or for no reason." App., *infra*, 4a (emphasis added).

That holding encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needlessly delaying the trial and preparing and reviewing a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. A defendant may also in effect delay his decision whether to plead guilty until he has had the opportunity to review the presentence report,

at which time the defendant's expectations about his sentence may be less optimistic than at the time of the guilty plea.

Finally, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. Because the court of appeals' holding will produce those adverse consequences for the administration of criminal justice, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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OCTOBER 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. CR-91-00672-SBA
No. 95-10113

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT E. HYDE, DEFENDANT-APPELLANT

Appeal From The United States District Court
For The Northern District Of California
Saundra B. Armstrong, District Judge, Presiding

[Argued and Submitted April 8, 1996]
[Decided April 30, 1996]

OPINION

Before: WARREN J. FERGUSON, DOROTHY W. NELSON, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ; Concurrence by Judge FERGUSON.

FERNANDEZ, Circuit Judge:

Robert Elmer Hyde was indicted for mail fraud and wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 2(b). He then entered into a plea agreement and entered his guilty plea. The district court accepted the guilty plea but reserved ruling on the acceptance of the plea

agreement until it had seen the presentence report. Long before that report was prepared, Hyde moved to withdraw his plea. The district court determined that he had not given a sufficient reason to justify withdrawal. Thus, it denied his motion and went forward to judgment and sentencing. Hyde appealed. We reverse and remand.

STANDARD OF REVIEW

We review for an abuse of discretion the district court's denial of a motion to withdraw a guilty plea. *See United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir.1995). A failure to apply the correct legal principles is an abuse of discretion. *See Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 292 (9th Cir.1989).

DISCUSSION

The government argues and the district court found that Hyde did not offer a "fair and just reason" to withdraw his plea. Fed.R.Crim.P. 32(e). However, we have held that when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the district court must permit the withdrawal. *See United States v. Washman*, 66 F.3d 210, 212-13 (9th Cir.1995); *United States v. Savage*, 978 F.2d 1136, 1137 (9th Cir.1992), *cert. denied*, 507 U.S. 997, 113 S.Ct. 1613, 123 L.Ed.2d 174 (1993). As we said in *Washman*:

> We need not decide whether Washman had a "fair and just" reason for withdrawing his plea pursuant to Fed.R.Crim.P. 32(e) because we hold that Washman should have been allowed to withdraw his plea without offering any reason. The reason is that, at the time Washman moved to withdraw from the plea agreement, the district court had not yet accepted the plea. Under our precedent, Washman and the Government were not bound by the plea agreement until it was accepted by the court.

66 F.3d at 212 (citations omitted).

But, the government argues, the district court did accept Hyde's plea even if it did not accept the plea agreement. That is a distinction without a difference. As we have held, "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea." *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir.1995) (citations omitted).

We have heard the government's ululation that the Sentencing Guidelines prohibit an early acceptance of pleas. United States Sentencing Guidelines § 6B1.1(c)[1] provides that:

> The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report. . . .

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[1] Because of *ex post facto* considerations, the district court used the Guideline Manual in effect July 15, 1988. This provision, however, remains the same to this day.

The government's concern is a bit overstated because a close reading of the Guideline shows that some plea agreements may still be accepted at the time of the plea. However, the Guidelines undoubtedly take away much of the discretion that a district court would otherwise have.[2] *See* Fed.R.Crim.P. 11(e)(1) & (2). Nevertheless, if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention.

CONCLUSION

When a defendant seeks to plead guilty, the district court must hold a plea hearing. Fed.R.Crim.P. 11. According to that Rule, the court may then accept, reject, or defer a decision on acceptance or rejection. Fed.R.Crim.P. 11(e). If the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire. Fed.R.Crim.P. 32(e).

Thus, the district court erred when it refused to allow Hyde to withdraw his plea. We therefore reverse his conviction and remand so that he can plead anew.

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[2] At the time relevant to this case, stand-alone policy statements were not necessarily binding. *See United States v. Forrester*, 19 F.3d 482, 483-84 (9th Cir.1994). Now they are. *See United States v. Plunkett*, slip op. 3417, 3422, 74 F.3d 938 (9th Cir. Mar. 12, 1996) (No. 95-95-30053).

REVERSED and REMANDED for further proceedings.

FERGUSON, Circuit Judge, concurring.

While I concur in the opinion of this case, I write in order to restate my dissent in *United States v. Cordova-Perez*, 65 F.3d 1552 (9th Cir.1995).

I continue to believe that case was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard *Cordova-Perez*, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in *Cordova-Perez*, it must live with the mistake.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-10113
D.C. No. CR-91-00672-SBA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT E. HYDE, DEFENDANT-APPELLANT

Appeal From The United States District Court
For The Northern District Of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
April 8, 1996- San Francisco, California

Filed April 30, 1996
Amended July 29, 1996

ORDER, DENIAL OF PETITION FOR REHEARING, REJECTION OF SUGGESTION FOR REHEARING EN BANC, AND AMENDED OPINION

Before: WARREN J. FERGUSON, DOROTHY W. NELSON, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ;
Concurrence by Judge FERGUSON.

ORDER

The opinion filed April 30, 1996, commencing at slip op. 5097, is amended as follows: footnote 2 at slip op. 5101 is replaced with the following:

> [2]At the very least, the district court must consider policy statements. We need not decide whether they are binding absent a departure. *Compare United States v. Forrester*, 19 F.3d 482, 483-84 (9th Cir. 1994) *with United States v. Plunkett*, 74 F.3d 938, 940 (9th Cir. 1996). Whether they are binding or not, the result of this case remains the same.

With the opinion thus amended, the panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT OF THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR 91-0672 SBA

UNITED STATES OF AMERICA, PLAINTIFF

v.

ELMER ROBERT HYDE, DEFENDANT

[Filed July 19, 1994]

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA

On June 2, 1994, this Court conducted an evidentiary hearing on defendant's motion to withdraw his guilty plea. After having considered the papers submitted in connection with the motion and the testimony of the witnesses at the evidentiary hearing, the Court finds that defendant's motion should be denied.[1]

[1] The Court notes that defendant filed a variety of "motions" subsequent to filing his motion to withdraw his guilty plea. Defendant has styled these submissions a Motion for Dismissal of All Charges in the Interests of Justice, Petition for a Writ of Habeas Corpus, Motion to Dismiss this Case in the Best Interest of Justice, and Motion to Withdraw Breached Guilty Plea. The crux of these motions is essentially the same—namely, that the defendant should be released because he did not commit the crimes charged in the Indictment. Because these motions are duplicative of the instant motion before the Court, each of these motions is denied.

BACKGROUND

Defendant Elmer Hyde was charged with masterminding and operating a bogus loan brokerage scam. Defendant effected this scheme by holding himself out as a loan broker and president of a company known as the Money Brokers Association ("MBA"). Under the guise of the MBA, defendant would promise to obtain loans on behalf of the prospective applicants in exchange for up-front application fees. Defendant Hyde accepted the fees despite never having arranged for the financing.

The Government charged the defendant with the following violations: (1) 18 U.S.C. § 1341—mail fraud (Counts 1, 4, 5); (2) 18 U.S.C. § 1343—wire fraud (Counts 6, 7, 8); (3) 18 U.S.C. § 2315—receiving stolen property (Counts 2, 3); and (4) 18 U.S.C. § 2(b)—wilfully causing an offense against the United States (Counts 1-8). The core allegations are contained in Count I. The remaining Counts charge defendant with various statutory violations for conduct related to the scheme.

Trial was set to commence on November 29, 1993. On the first day of trial but prior to the commencement of any proceedings, the Government and the defendant informed the Court that they were in the process of negotiating a plea agreement. Later that same day, defendant pled guilty to Counts I through IV of the Indictment as part of a written plea agreement filed with the Court. Before taking the defendant's plea, the Court extensively voir dired defendant pursuant to Federal Rule of Criminal Procedure 11 to verify that his change of plea was knowing, voluntary and intelligent.

On December 23, 1993, defendant filed a motion to withdraw his guilty plea on the ground that he entered his plea under duress. Specifically, defendant claims that he feared for his wife's life based on threats of harm allegedly made by the prosecutor in this case, Assistant United States Attorney Joel Levin, and other identified Justice Department employees.

On March 15, 1994, the Court conducted a hearing on defendant's motion. Defendant appeared in Court pro se with Michael Stepanian, his Court-appointed standby counsel.[2] During the hearing, the Court informed defendant that he had failed to present any cognizable evidence to support his claim that his plea was coerced or was otherwise the product of duress. The Court, however, permitted defendant until March 22, 1994, to allow Mrs. Carole Hyde, defendant's wife, to submit a sworn declaration setting forth the specific factual bases for his allegation that she had been harassed by the government.

Mrs. Hyde submitted her unsworn and unsigned declaration on March 21, 1994. In that declaration, Mrs. Hyde averred that Federal Bureau of Investigations Agent Robert Schenke ("Agent Schenke") came to her home in August 1993, and acted in a "menacing manner." (*See* Carole Hyde Decl. ¶ 3.) She alleges that he threatened her with arrest and made unspecified "threats" concerning her job. (*Id.*, ¶ 6.) Mrs Hyde

[2] Also set for hearing on this date was Defendant's Renewed Motion to Dismiss for Prejudicial Delay and Defendant's Ex Parte to Remove Assistant Counsel Michael Stepanian for Sexual Harassment and Other Acts or Moral Turpitude. The Court denied the motion to dismiss but granted to motion to remove standby counsel.

concludes that she "did influence [defendant] him to plea (sic) guilty because of [her] fears, he was conerned for [her] safety."

On April 7, 1994, after reviewing Mrs. Hyde's declaration, this Court scheduled an evidentiary hearing on defendant's motion. The Court's Order stated, in part:

> Mrs. Hyde's declaration is both vague and conclusory. Nevertheless, because there is some suggestion—however tenuous—that defendant entered his guilty plea under duress, it is important that the Court allow the parties to develop the requisite factual record from which the Court can determine, under the totality of the circumstances, whether plaintiff's plea was completely voluntary. *Iaea v. Sunn*, 800 F.3d 861, 866 (9th Cir. 1986).

Order (filed April 7, 1994) at 2. The Court set the evidentiary hearing for April 26, 1994.

On April 19, 1994, one week prior to the date scheduled for the evidentiary hearing, defendant filed a document styled as a "Request for Court's Compulsory Processes (sic) to Obtain Witnesses for Evidentiary Hearing April 26, 1994." In this document, defendant requested that the Court issue subpoenas to compel the attendance of ten witnesses for the evidentiary hearing.[3] The Court liberally construed this request as one made under Federal Rule of Criminal Procedure 17, which governs the issuance of subpoenas in criminal cases. Because defendant failed to make the requisite proffer required under Rule 17,

[3] Included in defendant's list was Judge Patel of this Court, a Time magazine correspondent, and several federal prisoners.

the Court denied defendant's request. *See* Order (filed April 26, 1994). The Court, however, granted defendant leave to file an amended Rule 17(b) request with the necessary information.[4] The Court also ordered defendant to provide information to show his financial inability to pay the fees of the witnesses. This additional information was due by May 12, 1994. The Court vacated the evidentiary hearing set for April 26, 1994, to allow defendant sufficient time to prepare his renewed Rule 17 request.

Defendant failed to file a renewed Rule 17 request. Thus, on May 13, 1994, this Court issued an Order rescheduling the evidentiary hearing for June 2, 1994. At the hearing, defendant presented the testimony of his wife, Carol Hyde, and his daughter, Crystal Hiddleston. The Government proffered Agent Schenke. The Court took the defendant's motion to withdraw his guilty plea under submission at the close of the evidentiary hearing.

DISCUSSION

A. *Legal Standard*

A defendant has no right to withdraw a guilty plea. *United States v. Castello*, 724 F.2d 813, 814 (9th Cir. 1984). Nevertheless, the Federal Rules of Criminal Procedure permit a defendant to withdraw a guilty plea prior to sentencing "upon a showing by the defendant of any fair and just reason." Fed. R. Civ. P.

[4] Specifically, the renewed Rule 17 request was to be accompanied by a written statement which indicated, for each witness: (a) the nature of the testimony to be elicited; (b) the relevance of such testimony to the issue of whether defendant's guilty plea was involuntary; and (c) an explanation of why the witnesses' testimony is necessary to the adjudication of the voluntariness issue.

32(d). The burden is on the defendant to present a "plausible reason for withdrawal." *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). A "change of heart" alone is insufficient. *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990). The court has "broad discretion" in deciding whether to allow the withdrawal of a guilty plea. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1070 (9th Cir. 1987).

B. *There is No Evidence To Support Defendant's Claim of Coercion*

In the present case, defendant seeks to withdraw his guilty plea because he claims it was the product of duress. A guilty plea which is the result of coercion or duress is not voluntary, and hence, is invalid. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). In such cases, "[the] concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea." *Id.* While threats made against third parties are not per se coercive, they should be carefully considered by the Court in assessing the voluntariness of a plea. *See Castello*, 724 F.2d at 815. Thus, in determining voluntariness, the court looks to the "totality of the circumstances." *Iaea*, 800 F.2d at 866.

Here, defendant asserts that he was coerced into entering a guilty plea based on threats allegedly made against his wife by Agent Schenke. There is absolutely no credible evidence to support this claim.[5] At the evidentiary hearing, Mrs. Hyde admitted that at no time did she advise the defendant to plead guilty on

[5] There was also no evidence of misconduct or coercive behavior by any other person.

her account. She further testified that she had repeatedly urged the defendant *not* to plead guilty and that he should contest the charges in the indictment. In fact, Mrs. Hyde's last advice to the defendant was to plead not guilty.[6]

There is also no evidence that Agent Schenke improperly threatened or coerced Mrs. Hyde. Agent Schenke first made contact with Mrs. Hyde in August 1993, after the defendant had temporarily absconded. Agent Schenke visited Mrs. Hyde as part of his standard FBI investigation into the defendant's whereabouts. Although Mrs. Hyde testified that she felt "terrorized" and "harassed" by Agent Schenke's presence, there is no evidence that he made any threats against her other than to warn her that harboring a fugitive was illegal. In addition, Mrs. Hyde admitted on cross-examination that Agent Schenke never threatened her and that he told her there would be no problem so long as she cooperated in his investigation. In light of her in-court testimony, the Court finds that Mrs. Hyde's allegations of coercion are simply incredible.

In contrast to the paucity of evidence to support the alleged governmental coercion, defendant has repeatedly admitted his guilt while under oath. (*See* Application to Enter a Guilty Plea ¶¶ 5, 23.) Similarly, in the Application to Enter a Guilty Plea and the Plea Agreement (both filed on November 29, 1993), defendant represented to the Court that his decision to enter a guilty plea was not "forced or coerced by any

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[6] Defendant's claim that he plead guilty at the insistence of his wife is further undermined by Mrs. Hyde's testimony that she had *no contact* with him during the plea negotiations which took place on November 29, 1993.

threats or compulsion, direct or indirect, to [him] *or any other person.*" (*See* Application to Enter a Guilty Plea ¶ 25; Plea Agreement ¶ 10.)

Moreover, prior to accepting the defendant's change of plea, the Court conducted an lengthy voir dire of the defendant pursuant to Federal Rule of Criminal Procedure 11 to confirm that his change of plea was completely voluntary and proper. During that voir dire, the Court specifically asked defendant whether his guilty plea was in any way coerced; the defendant responded it was not:

> THE COURT: Has anyone threatened you in any way to make or force you to enter a guilty plea?
>
> DEFENDANT: No, they haven't, your honor.
>
> THE COURT: Are you pleading guilty to protect anyone?
>
> DEFENDANT: No, I am not.

(Reporter's Transcript at 17:2-7.) The Court is entitled to credit defendant's testimony at the Rule 11 hearing over his subsequent testimony. *See Castello*, 724 F.2d at 815.

In an attempt to discount his prior admissions of guilt to the Court, defendant testified at the evidentiary hearing that he lied to the Court at the Rule 11 hearing because his wife "begged" him to plead guilty. As for explaining his statements in the Plea Agreement and the Application to Enter a Guilty Plea, defendant claims he did not read those documents and that he would have signed anything presented to him

by the Government.[7] Because the Court finds that the defendant lacks any semblance of credibility, the Court places no weight in these explanations. Accordingly, based on the totality of the circumstances, the Court finds that the defendant entered his guilty plea knowingly, voluntarily and intelligently.

C. *There Was No Error at the Rule 11 Hearing*

At the evidentiary hearing, defendant raised an issue concerning the propriety of the Court's Rule 11 voir dire. Specifically, he claimed that because the Plea Agreement was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(B), the Court erred in not advising him that he had no right to withdraw his guilty plea.

Rule 11(e) sets forth the appropriate procedure for plea agreements. Under Rule 11(e)(1), the government may do any of the following in exchange for a plea of guilty or nolo contendere:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

[7] At the evidentiary hearing, defendant admitted that he was untruthful with the Court at the time he entered his guilty plea. Defendant claimed that his dishonesty was justified because, from his perspective, everyone "lies" in these types of proceedings, including the Court and the prosecutor. The Court finds that defendant's cavalier explanation exemplifies his disturbing and blatant disregard for the truth and evidences a complete lack of credibility.

> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1)(A)-(C). Rule 11(e)(2) provides that "[i]f the agreement is of the type specified in subdivision (e)(1)(B), the Court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea."

The instant Plea Agreement indicates that it is pursuant to Rule 11(e)(1)(B). However, counsel for the Government explained at the hearing that this was a typographical error, and that the Agreement should have indicated Rule 11(e)(1)(A). The Court has reviewed the Plea Agreement and concurs with the Government. At paragraph 1 of the Plea Agreement, the Government expressly agreed to dismiss Count V through VIII of the Indictment in exchange for his guilty plea as to Counts I through IV. The Government also agreed that it would not bring any additional charges against the defendant based on his operation of or involvement in certain other fraudulent activities. (Plea Agreement ¶ 3.) There are no promises by the government in the Plea Agreement that it would make a recommendation, or agree not to oppose the defendant's request, for a particular sentence. Thus, the Court concludes that defendant's claim of error as a basis for withdrawing his guilty plea is without merit.

CONCLUSION

The record before the Court is devoid of any suggestion that defendant's guilty plea was in anyway coerced. Defendant's claim of coercion is nothing more than an attempt to avoid the consequences of his criminal conduct. Accordingly,

IT IS HEREBY ORDERED THAT:

(1) Defendant's motion to withdraw his guilty plea is DENIED.

(2) Defendant's Judgment and Sentencing shall take on **October 4, 1994**, at 1:30 p.m., in Courtroom 2 of the United States Courthouse, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, 94102.

IT IS SO ORDERED.

DATED: July 18, 1994

/s/ SAUNDRA BROWN ARMSTRONG
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX D

STATUTORY PROVISIONS AND RULES

1. Rule 11 of the Federal Rules of Criminal Procedure provides:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided

by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea disussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo

contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Rule 32 of the Federal Rules of Criminal Procedure provides, in pertinent part:

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

3. Sentencing Guidelines § 6B1.1 provides, in pertinent part:

§ 6B1.1. PLEA AGREEMENT PROCEDURE (POLICY STATEMENT)

(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to

accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

Commentary

This provision parallels the procedural requirements of Rule 11(e), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has

had an opportunity to consider the presentence report.